

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

ORIGINAL

77-6033 B

United States Court of Appeals

FOR THE SECOND CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

—v.—

AMERICAN EXPRESS COMPANY,

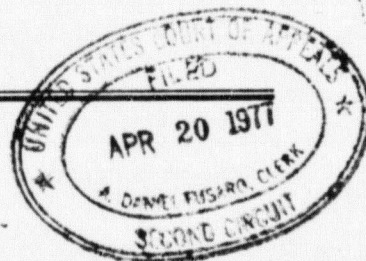
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

PROSKAUER ROSE GOETZ &
MENDELSON
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Appellant*
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EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Plaintiff-Appellee
2401 E Street, N.W.
Washington, D. C. 20506
(202) 634-6150



PAGINATION AS IN ORIGINAL COPY

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DATE	NR	PROCEEDINGS	(pg.#2)
1-21-76	(1)	Filed complaint & issued summons.	
02-10-76	--	CASE REASSIGNED TO DUFFY, J.	
03-01-76	(2)	Filed summons and return- Unable to serve: American Express Company-- 2-11-76	
4-23-76	3	Filed notice of reassignment to Judge Goettel M/N	
5-05-76	4	Filed pltf's first set of interrog. to deft. Company	
5-05-76	5	Filed stip. and order ext. deft's time to answer to 5-24-76--Duffy, J.	
5-29-76	7	Filed marshal's return served--Howard Clarke, Chairman of the Board on 4-9-76	
5-25-76	8	Filed proof of service that Ann H. Lister served order to show cause to Ronald Copeland on 5-24-76	
5-25-76	9	Filed deft. affdvt. and order to show cause that pltf Equal Employment Opportunity Comm. show cause in Rm. 312 on 6-1-76 at 9:30 A.M. why an order should not be made enlarging deft's time to answer or object. interrog. of pltf. and that service shall be rendered on or before 5-27-76 12:noon--Goettel, J.	
5-27-76	10	Filed stip. and order ext. deft's time to answer to 6-1-76	
6-01-76	11	Filed deft. memorandum in support of motion for enlargement of time	
6-01-76	---	Filed memo. end. on document #9 Motion disposed of pursuant to stipulation of parties--Goettel, J. m/n	
6-02-76	12	Filed deft. affdvt. and notice of motion for an order dismissing the complaint ret. 6-14-76.	
6-02-76	13	Filed deft. memorandum in support of above motion to dismiss the complaint	
6-02-76	14	Filed stip. and order adj. deft's time to answers or object interrog. to 6-21-76--Goettel, J.	
6-16-76	15	Filed stip. nad order that defts. motion to dismiss is adj. to July 6, 1976 and defts. time to serve answers to pltf's. 1st set of interrog. is adj. to July 13, 1976 and pl to respond to motion is adj. to June 30, 1976. So ordered, Goettel, J.	
7-06-76	16	Filed plaintiff's memorandum in opposition to deft's motion to dismiss	
7-02-76	17	Filed deft's affdvt. and notice of motion for an order striking ret. 3-2-76	
7-20-76	18	Filed deft's reply memorandum on deft's motion to dismiss the complaint	
7-20-76	19	Filed stip. and order adj. ret. date of deft's motion to 7-20-76 and deft shall serve reply papers on or before 7-20-76. Dft's time to serve answers to pltf's interrog is enlarged to 8-9-76--Goettel, J.	
08-03-76	20	Filed pltf's memorandum in opposition to deft's motion to strike	
08-06-76	21	Filed ORDER that deft's time to serve answers or objections to interrog dated 5-3-76 is enlarged until thirty days after entry of the order determining the motion to dismiss the complaint--Goette, J.	
08-11-76	22	Filed deft's Reply memorandum on deft's motion to strike	
08-15-76	23	Filed plaintiff's response to deft's reply memorandum on motion to dismiss	
09-01-76	24	Filed deft's supplemental memorandum on motion to dismiss the complaint	
01-10-77	25	Filed OPINION #45505 denying defendants motion to dismiss with leave to renew its motion should the Supreme Court's disposition of <u>Equal Employment Opportunity Comm. v. Occidental Life Ins. Co.</u> , warrant the Court's reconsideration., etc. -- Goettel, J. m/n	
01-13-77	26	Filed Order that the opinion dtd. 01-06-77 (#45505) is amended nunc pro tunc The attached caption page and page 9 are substituted for the corresponding pages of the original. -- Goettel, J. m/n	
1-19-77	27	Filed deft's notice of motion for an order to amend the order of 1-10-77, for reconsideration of deft's motion to stay, for extending time to serve an answer and for further relief ret. 1-31-77	
1-19-77	28	Filed deft's memorandum in support of above motion for certification of appeal to The Court of Appeals and for dismissal of the portion of the complaint alleging sex discrimination continued on page -2-	

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF		DEFENDANT	DOCKET NO <u>76QIV 36</u>
EQUAL EMPLOYMENT OPPORTUNITY COMM'S		AMERICAN EXPRESS CO a NY Corp	PAGE <u>2</u> OF <u> </u> PAGE
DATE	NR	PROCEEDINGS	
01-23-77	-29-	Filed ANSWER of deft. PRG&M	
02-03-77	-30-	Filed pltf's memorandum in opposition to deft's motion for certification of appeal to the Court of Appeals and for dismissal of the portion of the complaint alleging sex discrimination	
02-04-77	-31-	Filed stip. and order adj. defts motion to 2-7-77 in the event counsel for deft is not available to argue the motion on extended date it will be heard on 2-14 or 2-21-77 depending on the date of counsel's return, deft's time to answer or object to pltf's interrog (First Set) is enlarged to 3-1-77--Goettel, J.	
02-08-77	-32-	Filed stip. and order adj. ret of deft's motion to 2-14-77--Goettel, J.	
01-19-77	---	Filed memo. end. on document # 23 motion to dismiss is denied ---Goettel, J. m/	
02-15-77	-33-	Filed deft. American Express Co. notice of appeal to the USCA for the Second Circuit from order of 1-10-77. mailed copy to Equal Employment Opportunity Commission and Ronald Copeland	

A TRUE COPY
 RAYMOND E. BURKHARDT, Clerk

[Signature]
 Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)
)
Plaintiff,)
)
v.)
)
AMERICAN EXPRESS COMPANY,)
A New York Corporation,)
)
Defendant.)

75-611-35
CIVIL ACTION NO.
COMPLAINT

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 451, 1343, and 1345. This is an action authorized and instituted pursuant to Section 706(f) (1) and (3) and (g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq. (Supp. II, 1972), hereinafter referred to as "Title VII."

2. The unlawful employment practices alleged below were and are now being committed within the State of New York and the Southern Judicial District of New York.

PARTIES

3. Plaintiff, Equal Employment Opportunity Commission, (hereinafter, the "Commission"), is an agency of the United States of America charged with the administration, interpretation and enforcement of Title VII and is expressly authorized to bring this action by Section 706(f) (1), 42 U.S.C. Section 2000e-5(f) (1).

4. Since at least July 2, 1965, Defendant, the American Express Company, (hereinafter, the "Company") has continuously been and is now a New York corporation, doing business in the State of New York and City of New York, where it is engaged in the business of providing credit card and travel services to persons throughout the country and has continuously and does now employ more than twenty-five employees.

5. Since at least July 2, 1965, the Company has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Section 701(b), (g) and (h) of Title VII, 42 U.S.C. Section 2000e-(b), (g) and (h).

STATEMENT OF CLAIM

6. More than thirty (30) days prior to the institution of this lawsuit, persons claiming to be aggrieved filed charges with the Equal Employment Opportunity Commission alleging violations of Title VII by the Defendant. All conditions precedent to the institution of this lawsuit have been fulfilled.

7. Since July 2, 1965, and continuously up until the present time the Company has intentionally engaged in unlawful employment practices at its New York City and Washington, D.C. facilities in violation of Section 703(a) of Title VII by discriminating against Blacks because of their race and national origin, and women because of their sex, including, but not limited to:

- A. The limitation, segregation and classification of Black employees and Black applicants for employment because of their race and national origin.
- B. The maintenance of discriminatory recruitment and hiring practices and policies, customs and usages, including but not limited to reliance upon word-of-mouth recruitment, and requirement that applicants for employment answer arrest inquiries and wage garnishment inquiries.
- C. The continuous maintenance of policies and practices with respect to discharge which result in a disproportionately high number of Blacks being terminated because of their race and national origin.

D. The continuous maintenance of policies and practices which impose limitations on Blacks because of their race and national origin as to more desirable, higher paying positions, such as supervisory or managerial categories.

E. The maintenance of policies and practices concerning maternity leave and benefits which adversely affect female employees because of their sex.

8. The effect of the policies and practices complained of in Paragraph seven above, has been to deprive Black applicants and employees because of their race and national origin and female employees because of their sex of equal job opportunities and otherwise to adversely affect their status as employees and prospective employees because of their race, sex, and national origin.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully prays that this Court:

A. Grant a permanent injunction enjoining Defendant, its officers, agents, employees, successors, assigns and all persons in active concert or participation with it, from engaging in any employment practices which discriminate because of race, sex and nationality.

B. Order Defendant to institute and carry out policies, practices and affirmative action programs which provide equal employment opportunities for Blacks and females and which eradicate the effects of Defendant's past and present unlawful employment practices.

C. Order Defendant to make whole those persons adversely affected by the unlawful employment practices described above, by providing appropriate back pay, with interest, in an amount to be proved at trial and other affirmative relief necessary to eradicate the effects of Defendant's unlawful employment practices.

6a

D. Grant such further relief as the Court deems
necessary and proper.

E. Award the Commission its costs in this action.

ABNER W. SIBAL
General Counsel

WILLIAM L. ROBINSON
Associate General Counsel

Ronald Copeland

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Regional Counsel
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Delores Wilson

DELORES WILSON
Regional Attorney

JUDITH E. HARRIS
Assistant Regional Attorney

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Philadelphia Regional Litigation
Center
127 North 4th Street, Suite 200
Philadelphia, Pennsylvania 19106
(215) 597-0896

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
:
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, : 76 Civ. 365 (GLG)

Plaintiff, : NOTICE OF MOTION
-against- : TO DISMISS
AMERICAN EXPRESS COMPANY, : COMPLAINT

Defendant. :
-----x

PLEASE TAKE NOTICE that upon the annexed affidavit of Morton M. Maneker, sworn to June 1, 1976, defendant's memorandum of law, and all prior proceedings herein, the undersigned will move this Court before Hon. Gerard L. Goettel, U.S.D.J., in Courtroom 312 of the United States Courthouse, Foley Square, New York, New York at 10:00 a.m. on Monday, June 14, 1976, or as soon thereafter as counsel can be heard, for an order

(1) dismissing the complaint herein pursuant to Rule 12(b)(1), (6), Fed. R. Civ. P. upon the grounds that the Court lacks jurisdiction over the subject matter of the action and the complaint fails to state a claim upon which relief can be granted, and upon the further grounds that the action is barred by the statute of limitations and by plaintiff's laches in bringing suit; or, if the complaint is not dismissed,

(2) granting a stay of all proceedings herein which relate to defendant's maternity leave and maternity

benefits and policies, pending the Supreme Court's determination of General Electric Co. v. Gilbert, 519 F.2d 661 (4th Cir. 1975);

(3) enlarging defendant's time to serve answers or objections to plaintiff's first set of interrogatories until after the hearing and determination of the instant motion to dismiss; and

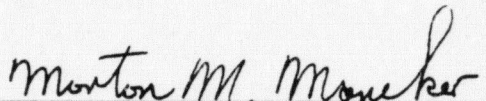
(4) granting such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that General Rule 9(c)(2) of this Court requires that opposing affidavits and answering memoranda, if any, be served at least three days before the return day of the motion.

Dated: New York, New York
June 1, 1976

PROSKAUER ROSE GOETZ & MENDELSON

By



Morton M. Maneker

A Member of the Firm

Attorneys for Defendant
300 Park Avenue
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Tel. (212) 593-9000

TO:

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Attorney for Plaintiff
Philadelphia Regional
Litigation Center
127 North 4th Street, Suite 200
Philadelphia, Pennsylvania 19106

9a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - -x

EQUAL EMPLOYMENT OPPORTUNITY	:	
COMMISSION,	:	
	:	76 Civ. 365 (GLG)
Plaintiff,	:	
	:	AFFIDAVIT IN
- against -	:	<u>SUPPORT OF MOTION</u>
	:	
AMERICAN EXPRESS COMPANY,	:	
	:	
Defendant.	:	
	:	

- - - - -x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MORTON M. MANEKER, being duly sworn, deposes and
says:

1. I am a member of the firm of Proskauer Rose
Goetz & Mendelsohn, attorneys for defendant American Express
Company. I make this affidavit in support of defendant's
motion to dismiss the complaint herein pursuant to
Rule 12(b)(1), (6) of the Federal Rules of Civil Procedure.

2. Submitted herewith are true copies of the
following documents relating to this case and the prior
proceedings before plaintiff Equal Employment Opportunity
Commission ("EEOC"):

Exhibit 1 - Determination of the New York State
Division of Human Rights, dated July 29, 1971, on the
complaint of Clarence M. Ferrell.

Exhibit 2 - Charge of Discrimination filed
with the EEOC on June 14, 1971 by Ferrell.

Exhibit 3 - Amended^{1ua} Charge of Discrimination filed April 27, 1972.

Exhibit 4 - EEOC Determination of Reasonable Cause dated January 17, 1973.

Exhibit 5 - Notice of Right to Sue sent to Ferrell by the EEOC on July 3, 1973.

Exhibit 6 - Complaint filed September 20, 1973 in "Clarence M. Ferrell v. American Express Company," Civil Action File No. 73 C 1419, in the United States District Court for the Eastern District of New York (hereafter the "Ferrell action").

Exhibit 7 - EEOC "Memorandum Brief As Amicus Curiae" in the Ferrell action.

Exhibit 8 - Answer of American Express Company filed August 23, 1974 in the Ferrell action.

Exhibit 9 - Stipulation dated March 28, 1975 dismissing the Ferrell action with prejudice, so ordered by Hon. Orrin G. Judd, U.S.D.J., on May 5, 1975.

Exhibit 10 - Charge of Discrimination filed with the EEOC on March 14, 1972 by Mary A. Reese.

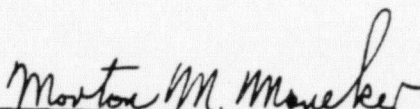
Exhibit 11 - EEOC Determination of Reasonable Cause as to Reese, dated April 23, 1973.

Exhibit 12 - Complaint in this action filed January 21, 1976, served on American Express on April 9, 1976.

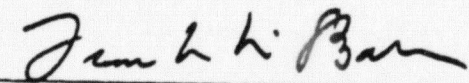
11a

Exhibit 13 - Plaintiff's First Set of Interrogatories in this action, served May 3, 1976.

3. Dismissal of the complaint is respectfully requested on the basis of the foregoing documents and defendant's memorandum of law.


Morton M. Maneker

Sworn to before me this
1st day of June, 1976.


James H. Bann

DETERMINATION AND ORDER AFTER INVESTIGATION

Case No.

Clarence Ferrell v. American Express Co.,
Credit Card Division;
and Horace Ferreira,
Supervisor

On June 25, 1971, Clarence Ferrell, who is Black, filed a verified complaint with the State Division of Human Rights charging the above-named respondents with an unlawful discriminatory practice relating to employment by denying him equal terms, conditions and privileges of employment and discharging him because of his race and color, in violation of the Human Rights Law of the State of New York.

After investigation, the Division of Human Rights determined that there is no probable cause to believe that the respondents have engaged or are engaging in the unlawful discriminatory practice complained of.

The complainant charged respondent Horace Ferreira with discriminating against him because of his race and color. Respondent Ferreira is also Black. Exhibits were submitted by respondents which indicated that the complainant's work performance and attendance pattern was unsatisfactory and that the complainant had been advised of the areas of dissatisfaction.

Upon the foregoing, the complaint is ordered dismissed and the file is closed.

The complainant or any party to the proceeding before the Division may appeal this order to the State Human Rights Appeal Board, 250 Broadway, New York, New York 10007, by filing a notice of appeal within fifteen (15) days after the date of the mailing of this order.

Dated: Jul 29 1971

STATE DIVISION OF HUMAN RIGHTS

By _____
George T. Boyce
Acting Regional Manager

To: Mr. Clarence Ferrell, complainant
119 Fennimore Street
Brooklyn, New York

American Express Co.
Credit Card Division, respondent
770 Broadway
New York, New York

Att: Mr. Horace Ferreira
Supervisor

You have a complaint, fill out this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area as soon as possible. It must be mailed within 180 days after the discriminatory act took place. (See addresses on back page)

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

(PLEASE PRINT OR TYPE)

Case File No. NY 1 1895

Your Name (Mr., Mrs., Miss) MR. CLARENCE M. FERRELL Phone Number 212 693-7460
 Street Address 118 FENIMORE ST.
 City Bklyn. N.Y. State N.Y. Zip Code 11225

WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☒ Religious Creed ☐ National Origin ☐ Sex ☐

Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and apprenticeship committee. If more than one, list all.

Name THE AMERICAN EXPRESS CO. CREDIT CARD DIV.
 Street Address 770 BROADWAY
 City NEW YORK CITY State NEW YORK Zip Code 10003
 Add (other parties if any)

Did you file this charge with a state or local government agency? Yes ☐ No ☐ When _____

Is your charge against a company or a union, how many employees or members? Over 25 ☐ Over 50 ☒

On the most recent date on which this discrimination took place: Month JUNE Day 11 Year 1971

Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary).

WHITE EMPLOYEES ARE NOT TREATED IN THE MANNER AS BLACKS, PARTICULARLY IN MY UNIT THE REP AREA. WHEN WE WOULD HAVE MEETINGS MY SUPERVISOR NEVER RESPECTED THE OPINIONS OF BLACKS. HE WAS QUICK TO TELL BLACKS THEY HAD BAD ATTITUDE. WHENEVER THEY DISAGREED WITH HIS OPINIONS. ONE BLACK WOMAN LEFT THE DEPT. BECAUSE SHE FELT SHE EVENTUALLY WOULD BE FIRED FOR HER DISAGREEMENTS WITH HIM. (MISS SHIRLEY GERMAN) I WAS ALSO FIRED BECAUSE THE COMPANY'S CUSTOMER SERVICE UNIT IN PART IS MOVING TO PHOENIX ARIZONA, & MIAMI, FLA. SO THEREFORE ANYTHING THAT CAN BE USED TO DISMISS ANY ONE WILL COME IN HANDY. MY SUPERVISOR MR. HORACE FERREIRA DID NOT GET ALONG OR SEE EYE TO EYE WITH HIS BLACK SUBORDINATES. WHITES ARE AFFORDED PREFERENTIAL TREATMENT.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Signed Clarence M. Ferrell Date 6-14-71
 Subscribed and sworn to before me this 14th day of June 1971
 Signature Carol Linder

If difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to learn how to do this.

U.S. GOVERNMENT PRINTING OFFICE: 1969-122-10000

• GPO: 1969 O - 322-562 (332)

FORM EEOC-5 (REV. 1-67)

BEST COPY AVAILABLE

CHARGE OF DISCRIMINATION

If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within specified time after the discriminatory act took place. IT IS HEREOFRE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. TNY 1-1885

(PLEASE PRINT OR TYPE) Amendment of Charge dated 6/14/71

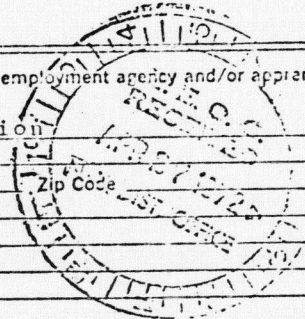
Your Name (Mr., Mrs., Miss, ^{Indicate}) Clarence M. Ferrell Phone Number (912) 355-0323
 Street Address Normandy Towers, Abercorn Extension, Apt. 192
 City Savannah State Georgia Zip Code 31406

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☐ Religious Creed ☐ National Origin ☒ Sex ☐

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name The American Express Co., Credit Card Division
 Street address 770 Broadway
 City New York State N.Y. Zip Code 10101
 AND (other parties if any)



4 Have you filed this charge with a state or local government agency? Yes ☐ When MONTH DAY YEAR No ☒

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6 The most recent date on which this discrimination took place: Month June Day 11 Year 1971

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

I believe that my supervisor, Mr. Horace Ferreira, who is a black West Indian, discriminated against me and other black Americans he supervised in the terms and conditions of employment and by discharging me. He also gave preferential treatment to white employees in the areas of work assignments and disciplining for attendance and lateness.

CYNTHIA W. GERRALD
 Notary Public, Chatham County, GA.
 My Commission Expires Mar 9, 1975

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date 4-25-72 Clarence M. Ferrell
 (Sign your name)
 Subscribed and sworn to before me this 25th day of April 198 72
Cynthia W. Gerald Notary Public
 (Name) (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
 NEW YORK DISTRICT OFFICE
 26 FEDERAL PLAZA, ROOM 4002
 (At Foley Square)
 NEW YORK, NEW YORK 10007
 264 - 3340

CERTIFIED MAIL NO. 298225

Clarence M. Ferrell
 148 Howell Street, N. E.
 Atlanta, Georgia

Charge No. TNY 1-1885
 Case No. TNY 3-048

Charging Party

vs.

American Express Company
 770 Broadway
 New York, New York 10003

Respondent

DETERMINATION

Under the authority vested in me by Section 1601.3 (d) of the Commission's Procedural Rules, 37-FR 183 (p. 20165) (September 27, 1972), I issue, on behalf of the Commission, the following Determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness and all other jurisdictional requirements have been met. Substantial weight has been accorded the action of the New York State Division of Human Rights.

Charging Party alleges that Respondent discriminated against him because of his race (Black) and national origin (American) by discharging him on June 11, 1971. Respondent denies the allegation and contends that Charging Party was discharged due to excessive lateness and absenteeism, poor performance, bad attitude towards supervisors, and failure to improve on all these points following a verbal warning and a probation. Charging Party contends that his absenteeism and lateness were no worse than that of some others in his unit, that his job performance was meritorious, and that his supervisor, Mr. Horace Ferrell, a Black West-Indian, imposed different standards on him than on similarly situated Caucasians and Black West-Indians.

American Express Company
Case No. YNY 3-048

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The record shows that twenty one persons came under Mr. Ferreira's supervision during Charging Party's term of employment. Thirteen were Caucasian, four were Black American, and four were Black West-Indian. Mr. Ferreira recommended the discharge of one Caucasian, two Black Americans, and one Black West-Indian. Of these discharges, Charging Party's was the only one in which absenteeism and lateness was a primary factor. The other Black American was discharged for embezzlement, the Black West Indian for insubordination, and the Caucasian for poor job performance.

As compared to the record submitted by Respondent for Charging Party, the personnel files for others supervised by Mr. Horace Ferreira did not contain memos regarding disciplinary problems and actions, but only job performance reviews and payroll actions. Respondent's Manager of Employment for the facility in which Charging Party was located states that such papers are kept by individual supervisors and are generally destroyed (at their discretion) after some time had passed or after an employee had been discharged. He stated that the disciplinary memos and warnings mentioned in some of Charging Party's co-worker's job performance reviews had been destroyed. Thus these could not be compared with those in Charging Party's record.

Respondent's time and attendance records indicate two types of non-vacation/holiday/sick time off: 1) "P"- paid partial or full days off allowed at discretion of management; and 2) "B" - unpaid partial or full days. The record shows that although Charging Party was out on "P" more times than any other employee, the total amount of time he spent out was less than that of three co-workers, all of whom were Caucasian. With respect to unpaid absences ("B"), both the number and amount of time Charging Party was out was less than one Caucasian co-worker. This Caucasian had been warned concerning her lateness in August, 1970, but was not further disciplined, although her lateness problem persisted until she resigned because of pregnancy one month prior to Charging Party's discharge.

American Express Company
Case No. YNY 3-048

Page 3

Respondent's records show that while approximately 12% of all its employees in 1971 were Black, 34% of all persons discharged for tardiness were Black. Also, Respondent has no set standard regarding the amount of tardiness sufficient to justify disciplinary action and discharge.

In reference to Charging Party's job performance, Respondent contends that Charging Party erred in hanging up on a customer, and that all employees are instructed to refer difficult calls to their supervisor and never to hang up. Charging Party contends that others had hung up on customers but were not disciplined. The limited personnel records available for employees supervised by Mr. Ferreira do not indicate whether or not there had been any other such incidents. Several co-workers interviewed verified the policy that employees should never hang up, but one stated that he had heard of employees doing so anyway. He was not, however, able to identify these employees.

Respondent contends that Charging Party further erred in asking a customer to put her request for a credit balance in writing. Examination of Respondent's policy statement with regard to refunds of credit balances shows that it does not specify whether or not verbal requests are acceptable, and several employees stated that during Charging Party's term of employment such requests did have to be submitted in writing.

The record as a whole supports the contention that the standards of performance and attendance expected of Charging Party were higher and/or different than for similarly situated co-workers. In the absence of comparable documents regarding the performance and disciplinary actions affecting similarly situated co-workers, and in view of the fact that a disproportionate number of Black employees were discharged due to excessive absenteeism and lateness, we credit Charging Party's allegation that his race and national origin were factors precipitating his discharge.

Charging Party further alleges that he and other Black Americans were discriminated against in the terms and conditions of employment, because of their race and national origin, by Mr. Horace Ferreira.

American Express Company
Case No. YNY 3-048

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Mr. Ferreira denies Charging Party's allegations and states that all employees in his unit were treated equally, without regard to race and national origin.

Four of Respondent's employees were interviewed, of whom two (Caucasian, Black American) had been supervised by Mr. Ferreira, and two (both Black American) had worked closely with Charging Party and/or Mr. Ferreira. Statement by these witnesses do not support a finding of discrimination in terms and conditions of employment against Black Americans, as a class.

Charging Party further contends, in affidavits, that few Blacks, in general, and Black Americans, in particular, are employed by Respondent in supervisory and managerial positions. A review of the record shows that only 27 out of 850 persons employed in this category are Black, and that a disproportionate number of these are of West Indian national origin.

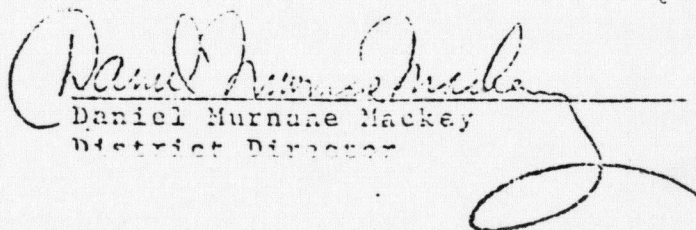
We also note that Respondent's employment application form requests information concerning previous arrests and garnishments. (Gregory v. Litton Systems, Inc., CA-9 [1972] CCH 5 EPD para. 8089; Johnson v. Pike Corp. of America, D. C. Cal. 1971, 332 F Supp. 400, CCH 4 EPD para. 7515).

Having determined that there is reasonable cause to believe that Respondent has engaged in unlawful employment practices, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. Please be advised that a representative of this office will be available to discuss settlement of this matter.

On behalf of the Commission:

JAN 17 1973

Date


Daniel Murnane Mackey
District Director

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

JUL 3 1973

TO:		FROM:	
Mr. Clarence M. Ferrell FDR Station P.O. Box 275 New York, New York 10022		Equal Employment Opportunity Comm. New York District Office 26 Federal Plaza, Room 4000 New York, New York 10007	
THIS CHARGE HAS BEEN DISMISSED FOR THE FOLLOWING REASON:		EEOC REPRESENTATIVE	
☐ NO REASONABLE CAUSE ☐ UNTIMELY CHARGE		Ralph Munoz, District Counsel	
☐ NO JURISDICTION ☐ FAILURE TO PROCEED		TELEPHONE NUMBER	CASE/CHARGE NUMBER
		264-3840	TNY 1-1885

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

Ralph Munoz
for District Director

cc:

Mr. Paul Weinberg
Manager - Personnel Relations
Credit Card Division
American Express Company
770 Broadway
New York, New York 10003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

CLARENCE M. FERRELL,

Plaintiff,

- against -

AMERICAN EXPRESS COMPANY,

Defendant.

----- X

CIVIL ACTION NO. 73C1419

COMPLAINT

I

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1343 (4); 42 U.S.C. sec. 2000e-5(f) and 28 U.S.C. sec. 2201 and 2202. This is a suit in equity authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964," 42 U.S.C. secs. 2000e et seq. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by (a) 42 U.S.C. secs. 2000e et seq., providing for injunctive and other relief against discrimination in employment and (b) 42 U.S.C. sec. 1981, providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States.

Plaintiff brings this action on his own behalf.

II

Plaintiff, CLARENCE M. FERRELL is a citizen of the United States and a resident of 2110 Westbury Court in the Borough of Brooklyn, City and State of New York. Plaintiff, CLARENCE M. FERRELL has been employed by defendant AMERICAN EXPRESS COMPANY in its facility in the credit card division at 170 Broadway, New York, N. Y.

III

Defendant American Express Company is a domestic

corporation doing business in the State of New York and the City of New York. The corporation is an employer within the meaning of 42 U.S.C. sec. 2000e (b) in that the company is engaged in an industry affecting commerce and employs at least 25 persons.

All matters regarding compensation, terms, conditions and privileges of employment of plaintiff has been, at all times material to this action, governed and controlled by defendant, American Express Company, exclusively.

The following policies, practices, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964 have been instituted and/or maintained by the defendant:

Plaintiff, Clarence M. Ferrell, an Assistant Customer Representative, contends that defendant discriminated against him because of his race (black) and national origin (American) in violation of the exercise of his rights guaranteed by Title VII.

Plaintiff alleges that on or about June 11, 1971, he was discharged from his employment as an Assistant Customer Representative in the credit card division of the defendant without just cause and solely by reason of the fact that his supervisor imposed different standards on plaintiff than on similarly situated Caucasians and Black West-Indians.

Specifically, the plaintiff, Clarence M. Ferrell, states the following in support of his claim:

1. That on June 11, 1971, his supervisor, Horace Ferraira, informed him that he was discharged; that a letter from a credit card holder complaining about the plaintiff had caused a review of plaintiff's personal file which revealed that plaintiff had been absent twice and late ten times in 1971 and that such record justified his discharge from employment.

2. Plaintiff submits that other employees in the same position and credit card division of the defendant had been the subject of one or more letters of complaint from credit card

holders none of which resulted in their dismissal.

3. Plaintiff further contends that his record of absences and lateness was surpassed by other employees and Mr. Ferraira himself and that such truly excessive absences and lateness did not result in or cause the discharge of such employees or Mr. Ferraira.

4. Plaintiff avers that if one did not drink with Horace Ferraira or forget to smile and say "good morning" to him or attempted to disagree with him in any respect, he would be treated as an enemy and subject to abuse and exploitation by him.

5. Plaintiff also avers that of all the employees of defendant under the supervision of Mr. Ferraira, his discharge was the only one occasioned by absenteeism and lateness and that his record of job performance and attendance surpassed that of similarly situated Caucasian and Black West-Indian employees who were neither fired nor disciplined.

6. That in September, 1973, plaintiff gave two tickets to a dance to Mr. Ferraira with the understanding that plaintiff would pay the \$10.00 charge for the tickets and that Mr. Ferraira should reimburse him for the tickets or return them at least one week before the dance so that plaintiff would have an opportunity to dispose of them to someone else; that Mr. Ferraira returned the tickets two days after the dance and finally reimbursed plaintiff for the \$10.00 advanced only after plaintiff complained to Mr. Ferraira's supervisor, John Gullerton.

7. Plaintiff's discharge was motivated solely by Horace Ferraira's ill-will toward him and other Black Americans and by the imposition of standards on him different than on other similarly situated employees of color race and national origin and that such actions and plaintiff's discharge were occasioned not by by discrimination practiced by the defendant

and some of its officers, agents and employees against him.

IV

The effect, purpose and intent of the policies and practices pursued by defendant, American Express Company, has been and continues to be to injure the plaintiff and interfere with his ability and attempts to obtain employment, depriving plaintiff of equal employment opportunities and otherwise adversely affect his status as a potential employee because of the record of his discharge as an employee of the defendant and plaintiff's inability to obtain a letter of reference from his previous employer requested by other business firms with whom plaintiff endeavored to seek employment.

The defendant company has refused to reinstate plaintiff in his employment or reimburse him for the salary lost by his unlawful discharge from employment.

V

On or about June 14, 1971, within ninety (90) days of the occurrence of the acts of which he complains, plaintiff filed a complaint with the Equal Employment Opportunity Commission alleging denial by defendant of plaintiff's rights under Title VII of the "Civil Rights Act of 1964." 4 U.S.C. secs. 2000e et seq.

The Equal Employment Opportunity Commission received the complaint from plaintiff on June 14, 1971, the charge was filed by the Equal Employment Opportunity Commission ^{on that date pursuant to its} procedural regulations, within the time limitations prescribed by Title VII of the Civil Rights Act of 1964.

On January 17, 1973, the Commission found reasonable cause to believe that the charge as stated is true, EEOC Decision No. 73-048. See "Exhibit A" attached herewith.

On or about April 5, 1973, plaintiff was advised by the Equal Employment Opportunity Commission that conciliation

efforts attempted with the parties had not been successful and that upon request to the Equal Employment Opportunity Commission he would be issued a "Notice of Right to Sue" which would entitle him to institute a civil action in the appropriate United States District Court within the ninety (90) days of receipt of said notice. 78 Stat. 260, as amended. "Exhibit B".

On or about April 11, 1973, plaintiff requested a "Notice of Right to Sue" from the Equal Employment Opportunity Commission. Plaintiff received said notice on July 6, 1973. 78 Stat. 260. "Exhibit C" attached herewith.

VI

Plaintiff has no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit is the only means of securing adequate relief. Plaintiff is now suffering and will continue to suffer irreparable injury from the defendant's policies, practices, customs and usages as set forth herein.

WHEREFORE, plaintiff respectfully prays this court to advance this case on the docket, order a speedy hearing at the earliest noticeable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant such relief as the court may deem appropriate.
2. That defendant be ordered to pay to the plaintiff appropriate back pay and such other compensatory damages as shall make plaintiff whole.
3. That defendant be ordered and directed to pay plaintiff reasonable attorney's fees as part of plaintiff's costs in this action pursuant to 42 U.S.C. sec. 2000e - 5(k).

Dated: Brooklyn, New York
September 17, 1973.

Irving Engel
IRVING ENGEL
50 Court Street
Brooklyn, New York 11201
Attorney for Plaintiff

IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLARENCE FERRELL,
Plaintiff,

v.

AMERICAN EXPRESS COMPANY,
Defendant.

Civil Action No. 73 Civ 1419 OGJ

MEMORANDUM BRIEF AS AMICUS CURIAE
BY THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS

STATEMENT ON THE CASE

This is an action brought by plaintiff, Clarence Ferrell, a black man, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et. seq (Supp. II, 1972) alleging that defendant American Express Company (hereafter the Company) has discriminated against him on the basis of race and national origin. The case is presently before the Court on the Company's Motion for Summary Judgment based on the Company's assertion that plaintiff is barred from proceeding in this Court because his claim was found to be without merit by the New York State Division on Human Rights after an informal investigative conference. The relevant facts, may be summarized as follows:

Plaintiff alleges that he was discharged by his former supervisor, a black West Indian, who allegedly prefers white and black West Indians, because he is an American black. He filed a charge of race and national origin discrimination protesting his discharge with the Federal Equal Employment Opportunity Commission. The Federal Commission initially referred his charge to the New York State Division on Human Rights, pursuant to Section 706(e) of Title VII and 29 C.F.R. 1601.12(b) of its procedural regulations. See Id., Ellen G., 431 U.S. 407 (1977).

Approximately 20 days after the complaint was filed with it, ^{1/} the New York State Division, pursuant to its regulations, Human Rights Law, Art. 15, Sec. 297-3(a), held an "investigatory conference" on plaintiff's claim. At this conference plaintiff was not represented by Counsel. No sworn testimony was taken. The only record of the proceeding appears to be a Division of Human Rights' staff memorandum which summarizes generally the positions of the parties. The Company's position was that plaintiff had been discharged for poor performance and excessive lateness, and that his supervisor was not any less harsh on whites or black West Indians since he had discharged two West Indians for insubordination. The memorandum notes that plaintiff had produced no new evidence or witnesses following the conference as he had been told that he might.

Two weeks after the conference, on July 21, 1971 the Division of Human Rights issued its determination that there was no probable cause to believe that plaintiff had been discriminated against. The reasons given were that plaintiff had a poor work record and had been fired by someone of his own race.

Thereafter the Federal Equal Employment Opportunity Commission assumed jurisdiction over plaintiff's charge. The Commission found reasonable cause to believe that plaintiff's allegations were true. The Commission found that plaintiff was the only employee under his supervisor who was discharged for absenteeism or lateness; ^{2/} that three white employees under the same supervisor were absent more frequently than plaintiff;

^{1/} The State's determination indicates that the charge was filed with the State on June 25, 1971. The records of the hearing, discussed, intra, show that it was held on July 15, 1971.

^{2/} The Commission found that one West Indian employee had been dismissed for insubordination and one white employee for poor job performance.

that, of these, one had also had recurring lateness problems; and that a greatly disproportionate number of the Company's employees discharged for lateness were black. The Commission also noted that there was some evidence to indicate that the practices for which plaintiff had been criticized on the job may not have been unusual.

The Company has moved that this Court grant summary judgment dismissing plaintiff's claim on the grounds that the same claim has previously been finally adjudicated by the New York State Division on Human Rights. The Commission will demonstrate that the Company's claim is without merit.

ISSUE

Whether a plaintiff is precluded from proceeding in the Federal Courts by a State finding reached after an informal investigatory conference.

ARGUMENT

A STATE AGENCY'S FINDING THAT PLAINTIFF WAS NOT DISCRIMINATED AGAINST RENDERED AFTER AN INFORMAL HEARING UNDER STATE LAW, CANNOT BAR PLAINTIFF FROM ASSERTING HIS TITLE VII RIGHTS IN THE FEDERAL COURTS

The Company argues that the New York Division of Human Relations' finding of no reasonable cause to believe that plaintiff was discriminated against based upon an informal hearing precludes him from asserting his Title VII claim in this Court under the doctrines of res judicata and collateral estoppel. That and similar positions have repeatedly and emphatically been rejected.

The Second Circuit has refused to apply the doctrines of res judicata and collateral estoppel to bar a Title VII plaintiff who had entered into a settlement in State proceedings, the terms of which had been extensively litigated, and were then being litigated, in the New York state courts. Voutsis v. Union Carbide Corp. 452 F.2d 908 (2nd Cir. 1971) cert. denied 406 U.S. 918 (1972). The Sixth Circuit has refused to bar Title VII plaintiffs from seeking relief in Federal court relief denied them after extensive state administrative hearings. Cooper v. Philip Morris,

Inc., 464 F.2d 9 (6th Cir. 1972). The Third Circuit has held that a State agency's determination that its investigation of a charge did not substantiate the allegations made could not preclude subsequent Federal proceedings IBEW, Local 5 v. EEOC, 398 F.2d 248 n. 3 (3rd Cir. 1968). See also EEOC v. Local 780, Cement Mason's Union ___F.Supp.____ 1 FEP Cases 189, 190 (S.D. N.Y., 1967) ("The mere fact that the union was absolved by the State Commission for Human Rights is not res judicata").

The Supreme Court has recently rejected the analagous assertion that a prior, adverse arbitration award precludes subsequent resort to the Federal courts. Alexander v. Gardner-Denver Co. ___U.S.____, No. 72-5847 (February 19, 1974). In so doing it has provided the rationale for all of these decisions, namely that while Congress in enacting Title VII wished to preserve and utilize other causes of action, and other forms, to eliminate employment discrimination, ^{3/} "The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII...." id., Slip opinion, p. 19. The Court therefore held that after a prior adverse arbitration decision "the federal court should consider the employee's claim de novo. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate". Id., Slip Opinion, p. 23 (footnote omitted).

A similar procedure is also required where there has been an adverse state agency division on the employee's claim. Congress has clearly indicated that the final findings and orders of state agencies are not conclusive with respect to an individual's Title VII rights, but are to be afforded at most a respected status as evidence. Thus Section 706(b) provides that:

^{3/} Id., Slip Opinion, pp. 7-8, 10-12.

"In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the [deferral] provisions of subsections (c) and (d)".

However, since this provision is directed to the Commission, which cannot affect the final resolution of an individual's Title VII rights, ^{L/} such final findings and orders must necessarily be more closely scrutinized when offered as evidence in the courts. We therefore submit that such findings and orders should be scrutinized with respect to the relevant factors indicated in note 21, Slip Opinion, p. 23 of the Alexander v. Gardner-Denver opinion, including the procedural fairness of the proceedings and the adequacy of the record on which any findings are based. For as the Second Circuit has noted, Congress was well aware that state enforcement of non-discrimination is, in many areas "hampered by inadequate legislation, inadequate procedures, or an inadequate budget". Voutsis v. Union Carbide Corp., supra at 452 F.2d 894.

Under the rationale of Alexander v. Gardner-Denver, then, the plaintiff in this case is not precluded from proceeding in this Court merely because he has had an adverse decision in a prior state proceeding, for it is this Court which has the ultimate responsibility for determining whether Title VII has been complied with. We believe as much is also implicit in the Second Circuit's decision in Voutsis v. Union Carbide Corp., supra. Therefore, the Company is not entitled to summary judgment as a matter of law. Indeed such a ruling would be particularly inappropriate where, as in this case, the adverse finding is contradicted by a conflicting finding made by the Federal Commission.

^{L/} See Alexander v. Gardner-Denver, supra at Slip Opinion, pp. 7-8.

31a

We submit that both findings should be accorded weight as evidence in the trial of this case, and that the relative weight accorded to each be determined with respect to the factors set forth in Alexander v. Gardner-Denver, supra. In this regard we would note that the procedural deficiencies in the state proceedings - the absence of counsel, lack of record, apparent unavailability of discovery - must be taken into account. See Alexander v. Gardner-Denver Co., supra at Slip Opinion pp. 20-21. At this stage in the proceedings, however, we submit that there should be no question that the Company's Motion for Summary Judgment must be denied.

CONCLUSION

For the reasons given above we respectfully submit that the Company's Motion for Summary Judgment be denied.

Respectfully submitted,

WILLIAM A. CAREY
General Counsel

JOSEPH T. EDDINS, JR.
Associate General Counsel (Act'g)

BEATRICE ROSENBERG
CHARLES L. REISCHEL


JOSEPHINE A. TREVATHAN
Attorneys

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
1800 G Street, N.W.
Washington, D.C. 20506

February 21, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

CLARENCE FERRELL,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	<u>ANSWER</u>
AMERICAN EXPRESS COMPANY,	:	73 Civ. 1419
	:	OGJ
Defendant.	:	

-----X

Defendant, AMERICAN EXPRESS COMPANY ("defendant" or "Amexco"), alleges for its answer to the complaint herein as follows:

1. Denies each of the allegations contained in the first unnumbered paragraph of paragraph No. I of the complaint except admits plaintiff purports to invoke this Court's jurisdiction under the statutory provisions cited therein.
2. Denies knowledge or information sufficient to form a belief as to the truth of each of the allegations contained in paragraph No. II of the complaint except admits plaintiff was employed by Amexco's Card Division at 770 Broadway, New York, New York from June 16, 1969 to June 11, 1971..
3. Denies each of the allegations contained in paragraph No. III of the complaint except denies knowledge or information sufficient to form a belief as to the truth of each of the allegations contained in subparagraph No. 6 of the sixth unnumbered paragraph of that paragraph and admits that Amexco is a corporation organized under the laws of the State of New York and doing business in the State and

City of New York and that it is an employer within the meaning of 42 U.S.C. Section 2000e-1(b) and admits and alleges:

(i) on and for some time preceding June 11, 1971, plaintiff was employed in Amexco's Card Division as an assistant customer representative;

(ii) plaintiff's supervisor was Mr. Horace Ferreira ("Mr. Ferreira");

(iii) Mr. Ferreira and plaintiff are both black;

(iv) on June 11, 1971, Mr. Ferreira discharged plaintiff from defendant's employ;

(v) at the time of his discharge, plaintiff had reported late to work more often than any other member of his customer representative unit;

(vi) by that date, plaintiff had received unfavorable reports on at least six different occasions relating to lateness and/or complaints received by Amexco from its customers concerning plaintiff's lack of courtesy and helpfulness in dealing with their inquiries;

(vii) at the time of his discharge, plaintiff was informed by Mr. Ferreira that his employment was being terminated because of continued lateness and because Amexco had received another complaint about plaintiff from a customer;

(viii) while other Amexco employees may have on one or more occasions been the subject of customer's complaints or been late or absent from work without necessarily having their employment

terminated, plaintiff's record of job performance, customer's complaints, absence and lateness on June 11, 1971 warranted his termination and the determination to discharge or not to discharge those other employees, just as the determination to discharge plaintiff was unrelated to the race, color and national origin of those other employees or plaintiff, respectively.

4. Denies each of the allegations contained in paragraph No. IV of the complaint except defendant admits plaintiff has received from Amexco neither reinstatement nor compensation for the claims purported to be alleged in the complaint herein.

5. Denies knowledge or information sufficient to form a belief as to the truth of each of the allegations contained in paragraph No. V of the complaint except defendant admits

(i) on June 14, 1971, plaintiff verified and attempted to file with the Equal Employment Opportunity Commission ("the EEOC") a Charge of Discrimination alleging discrimination in employment by Amexco's Card Division;

(ii) the EEOC received plaintiff's Charge of Discrimination on June 14, 1971 but did not accept it for filing;

(iii) on June 25, 1971, plaintiff verified and filed a Complaint (the "State Division Complaint") with the State Division of Human Rights of the Executive Department of the State of New York (the "State Division") alleging

discrimination in employment by Amexco's Card Division and Mr. Ferreira and charging the respondents therein with an unlawful discriminatory practice relating to employment based on the same facts as those alleged in the EEOC Charge of Discrimination verified June 14, 1971 (A true copy of plaintiff's State Division Complaint is annexed hereto as Exhibit 1);

(iv) on July 29, 1971, the State Division issued a Determination and Order After Investigation dismissing plaintiff's State Division Complaint for lack of probable cause to believe that the respondents therein had engaged in or were engaging in the unlawful discriminatory practice complained of by plaintiff (A true copy of the State Division's Determination and Order After Investigation is annexed hereto as Exhibit 2);

(v) thereafter the EEOC accepted for filing plaintiff's Charge of Discrimination verified June 14, 1971;

(vi) on April 25, 1972, plaintiff verified and purported to file with the EEOC an "Amendment of Charge dated 6/14/71";

(vii) on January 17, 1973, the District Director of the New York District Office of the EEOC, professing to accord substantial weight to the actions of the State Division, issued a "Determination" that reasonable cause existed to believe that Amexco had engaged in unlawful employment practices (A true copy of the District Director's "Determination" is annexed to the complaint herein as Exhibit A).

6. Denies each of the allegations contained in paragraph No. VI of the complaint.

FIRST AFFIRMATIVE DEFENSE

7. The complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

8. The complaint herein is based upon the same act, event or occurrence, i.e., plaintiff's discharge on June 11, 1971 as was plaintiff's State Division Complaint and it relies upon the same alleged discriminatory discharge as that relied upon in the State Division Complaint.

9. The State Division is an administrative agency established by the New York Human Rights Law and vested by that law with plenary powers to adjudicate claims of discrimination in employment and grant remedial and corrective relief, including injunctions and damages, when such claims are proven.

10. The State Division dismissed plaintiff's State Division Complaint complaining of a discriminatory discharge for lack of probable cause.

11. Plaintiff did not appeal or seek review of the State Division's Determination and Order After Investigation before the New York State Human Rights Appeal Board or before the courts of the State of New York.

12. Upon expiration of the time to appeal or seek such review, the decision of the State Division determining and dismissing the claims of discrimination in connection with plaintiff's discharge on June 11, 1971 contained in plaintiff's State Division Complaint became final.

13. This action is barred by the res judicata and collateral estoppel effect of the prior and final determination of plaintiff's claim by the State Division.

THIRD AFFIRMATIVE DEFENSE

14. Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. §2000e-5(f)(1) and its predecessors provide, inter alia, that the timely filing with the EEOC of a Charge of Discrimination alleging that the respondent named therein has engaged in an unlawful employment practice by discriminating in employment against an individual because of such individual's race, religion, sex or national origin is a condition precedent to the commencement of a civil action to redress the alleged unlawful employment practice.

15. Neither plaintiff nor anyone on his behalf has filed with the EEOC within the time periods permitted by law a Charge of Discrimination alleging that Amexco has engaged in employment discrimination because of plaintiff's national origin within the time periods permitted by law.

16. Plaintiff's claim of discrimination in employment because of his national origin is barred by the failure to satisfy the statutory condition precedent and timely file a Charge of Discrimination with the EEOC alleging such discrimination.

FOURTH AFFIRMATIVE DEFENSE

17. Sections 706(c), (d), (e) and (f)(1) of Title VII, 42 U.S.C. §2000e-5(c), (e) and (f)(1) and their

predecessors provide, inter alia, that the commencement of proceedings before a state anti-discrimination agency in the state in which the discrimination allegedly occurred pursuant to a state law prohibiting employment discrimination is a condition precedent to the commencement of an action to redress such unlawful employment practice.

18. The New York Human Rights Law is a state law prohibiting employment discrimination because of an individual's race, creed, color, national origin or sex within the State of New York.

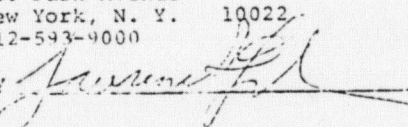
19. Each of the unlawful employment practices purportedly alleged in the complaint are alleged to have occurred within the State of New York.

20. Plaintiff has not commenced proceedings before the State Division alleging that Amexco engaged in employment discrimination because of plaintiff's national origin.

21. Plaintiff's claim of discrimination in employment because of his national origin is barred by his failure to satisfy the statutory condition precedent and commence proceedings before the State Division alleging such discrimination.

WHEREFORE, defendant American Express Company demands judgment dismissing the Complaint and granting it a reasonable attorney's fee, together with the costs and disbursements of this action.

PROSEAUER ROSE COLTE & MENDELSON
Attorneys for defendant
American Express Company
300 Park Avenue
New York, N. Y. 10022
212-593-9000

By 

137- Discontinuing Action Stipulation

UNITED STATES DISTRICT COURT
 COUNTY OF EASTERN DISTRICT OF NEW YORK

Index No. 75 C 1419

CLARENCE M. FENNELL,

Plaintiff

against

AMERICAN EXPRESS COMPANY,

Defendant

STIPULATION
 DISCONTINUING ACTION

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, the attorneys of record in the above entitled action, that whereas no party hereto is an infant or incompetent person, or where a committee has been appointed and no person not a party has an interest in the subject matter of the action, the above entitled action be, and the same hereby is discontinued, without costs to either party as against the other. This stipulation may be filed without further notice with the Clerk of the Court.

Dated: March 28, 1975

 The name signed must be printed beneath. PROSEUTOR ROSE (JOHN F. ROSE), JR., 8825. JAMES H. ROSE, JR., 8825.

 The name signed must be printed beneath.

By:

Attorney(s) for Defendant

Attorney(s) for Plaintiff

Filed: Brooklyn, NY
 May 5, 1975

ORRIN G. Tiedel

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.)

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. JDC 2-1023

(PLEASE PRINT OR TYPE)

1 Your Name (Mr., Mrs., Miss) MRS. MARY A. REESE Phone Number 559-41
 Street Address 3634 DEAN DRIVE, Apt. F
 City Hyattsville, State MARYLAND Zip Code 20782

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)
 Race or Color ☒ Religious Creed ☐ National Origin ☐ Sex ☐

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name MR. R. G. GABHART, AMERICAN EXPRESS COMPANY (MANAGER)
 Street address 1815 18th St. NW.
 City WASHINGTON, D.C. State _____ Zip Code _____
 AND (other parties if any) ASSISTANT MANAGER, MR. PICTER VAN RIJN, AMERICAN EXPRESS TRAVEL OFFICE, WORLD BANK, 1818 H St., N.W., Washington, D.C.

4 Have you filed this charge with a state or local government agency? Yes ☐ When _____ DAY _____ YEAR _____ No ☐

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6 The most recent date on which this discrimination took place: Month MARCH 13, Day MONDAY Year 1972

7 Explain what unfair thing was done to you: How were other persons treated differently? (Use extra sheet if necessary.)

MR. GABHART hired someone else in my position without giving me the choice of whether I'd like to transfer or stay in the position. He wanted me to transfer to the AMERICO office, at 18th + L Sts. I asked him if I would receive higher pay and he said NO. He then gave me a choice of "BETTER" reporting to that office. On next Monday morning or turning in my resignation by the 14th. This message was told to me by MR. VAN RIJN. I have also been with the company since July of 1970, going on maternity termination on June 11, 1971, and was rehired for a different position in Nov. 1971. I was rehired with the same wages as initially started - \$3.05/HR. When hired in 1970 I was told I would get a raise after six months but MR. GABHART explained that he couldn't because too many people were hired at the same time, and raises were set back 2 mos. I never got any.

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

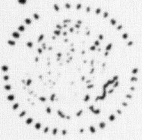
Date March 14, 1972 Mary Angelina Reese
 (Sign your name)

Subscribed and sworn to before me this 14th day of MARCH 19672

John A. Morgan
 (Name)

EET
 (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help to get the form sworn to.



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON DISTRICT OFFICE
1717 H Street, N. W.
Washington, D. C. 20006

Case No: YDC3-275

Charge No: TDC2-1023

APR 23 1973

Mary A. Reese
3634 Dean Drive, Apt. F
Hyattsville, Maryland 20782

Charging Party

vs.

American Express Company
1815 18th St., N.W.
Washington, D.C.

Respondent

DETERMINATION

The Commission has completed the investigation of the subject charge. Having considered the entire record and pursuant to Section 1601.19 (b) of the Commission's Procedural Rules, I issue the following determination as to the merits of the charge.

Respondent is an employer within the meaning of Title VII and the timeliness and all other jurisdictional requirements have been met.

The following facts are undisputed. Charging Party was hired by Respondent on July 20, 1970 as a Travel Clerk 1 at \$220 biweekly. In June 1971 Charging Party resigned for maternity reasons. She was rehired in November 1971 as a Travel Clerk 1 again at \$220 biweekly. On March 13, 1972, Respondent informed Charging Party that she was to transfer to another office. Charging Party indicated that she would transfer if Respondent would give her a raise and when Respondent refused, she resigned that same day.

Charging Party alleges that she was forced to transfer and was denied wage increases because of her race (Negro). Respondent denies the charge and states that Charging Party was asked to transfer because the office to which she was being transferred needed her experience. Respondent further states that since Charging Party would be transferring to the same position as she already held no salary increase was warranted. Respondent adds that Charging Party did not receive a salary increase during her first period of employment with Respondent because she notified Respondent that she would be terminating due to pregnancy; she did not receive a wage increase during her second period of employment because she resigned before she had worked six months, when she would have been eligible for an increase.

The investigation disclosed that in June 1971 when Charging Party notified Respondent of her pregnancy, she had no option but to resign since Respondent's maternity leave policy in effect at that time conditioned such leave upon two years of employment. In view of these circumstances, we find that Charging Party's resignation in June 1971 was involuntary. We further find that Respondent's two year eligibility requirement was a violation of Title VII. (See Commission Decision No. 71-562, issued December 4, 1970, Employment Practices Guide, para. 6184.)

The investigation further disclosed that other employees, both black and white, hired at or around the same time as the time Charging Party was initially hired have received merit increases, which Charging Party did not receive due to her interrupted service directly resulting from Respondent's discriminatory maternity leave policy. It is well settled that a current policy which perpetuates the effects of past discrimination is unlawful unless the policy serves an overriding legitimate business purpose. There is no showing by Respondent that its salary increase policy as applied to Charging Party is essential to the safe and efficient operation of its business. Accordingly, Respondent's salary policy which it applied to the Charging Party

Continuing from
Page 2

-3-

discriminated against her because of her sex in violation of Title VII.

Since Respondent's records demonstrate that black as well as white employees have received merit increases on a similar basis, there is no reasonable cause to believe that Charging Party's race was a factor in her being denied salary increases.

With respect to her transfer, Charging Party states that the Manager of her office informed her that she was being transferred because she was unhappy. Respondent insists, as noted previously, that the transfer was necessary because the other office needed Charging Party's experience. The investigation yielded no evidence indicating the necessity for the transfer.

Respondent's records indicate that Charging Party was the only black employee in her office other than a Messenger and the office to which she was being transferred contained other black employees. Respondent's records further indicate that only one other person had been reassigned to a different office during 1971 - 72 and the reassignment occurred because of the employee's lack of experience.

In view of the facts that no other employee was transferred under conditions similar to Charging Party and that she protested the lack of a salary increase at the time of the proposed transfer, we credit Charging Party's statement that she was directed to transfer due to her unhappiness. We conclude that Respondent's decision to transfer Charging Party and her refusal to transfer without a salary increase were the foreseeable effects of Respondent's discriminatory wage policy and, given these circumstances, her resignation constitutes a constructive discharge, occasioned by Charging Party's sex, and is unlawful within the meaning of Title VII.

Although Charging Party alleged that race was a factor in her transfer and although she was transferred from a virtually all-white office to a racially integrated office, we find no evidence that her race was a factor in her proposed transfer.

Like and related to the allegations of the charge are the following issues. The investigation disclosed that under the terms of Respondent's current maternity leave policy, accrued sick leave may not be used for maternity purposes and total maternity leave may not extend beyond six months. There are no similar restrictions on the use of sick leave or leaves of absence for other types of disabilities. Title VII requires that disabilities caused or contributed to by pregnancy be treated as other temporary disabilities with regard to sick leave plans and that policies regarding the commencement and duration of leave, the accrual of seniority and benefits and reinstatement shall be applied to disability due to pregnancy on the same terms and conditions as they are applied to other temporary disabilities. Since Respondent's maternity policy does not fulfill this requirement, we conclude that Respondent discriminates against females as a class in violation of Title VII by the maintenance of a discriminatory maternity policy.

The investigation raises the issue of whether Respondent is engaged in unlawful hiring practices in general. Respondent's records for the office to which Charging Party was to transfer indicate that it employs no black officials and managers (total of 5) and only one black sales person (total of 24). Title VII permits the use of statistical evidence to infer a pattern or practice of discrimination. Census statistics for 1970 reflect that the population of Washington, D.C. is 71% black and the population of the Washington Metropolitan Area is 25% black. Where, as here, the statistics reveal an extraordinarily small number of black employees, or none at all, in specified classifications, it is reasonable to infer that discrimination is taking place. Accordingly, we conclude that Respondent is maintaining hiring practices which discriminate against blacks in violation of Title VII.

The investigation further disclosed that Respondent maintains certain hiring criteria which discriminate against blacks as a class because of their race. Respondent's records indicate that it requires a high school education for the Travel Clerk position. This requirement has a substantially disproportionate impact on Negro applicants as a class and for that reason is unlawful, absent a showing of business necessity. Respondent has made no showing that a high school education is necessary to successful performance in the Travel Clerk position. Thus, we conclude that the high school education requirement, as applied to Negroes as a class, violates Title VII.

Secondly, Respondent requests on its application form that prospective applicants divulge their arrest record, if any. The consideration by an employer of an applicant's arrest record discriminates against Negro applicants in violation of Title VII, unless such consideration is shown to be essential to the safe and efficient operation of the employer's business. Furthermore, even if an employer does not consider arrest record information per se, the mere request for such information both tends to discourage applications by those with arrest records and tends to induce false or incomplete answers for which the applicant may be penalized. Since Negroes are arrested substantially more frequently than Caucasians in proportion to their numbers, Negroes as a class will be disproportionately subjected to these adverse effects of an arrest record inquiry. In the absence of any evidence of business justification for Respondent's practice of requesting arrest record information on its employment application forms, we conclude that this practice unlawfully discriminates against Negroes as a class because of their race in violation of Title VII.

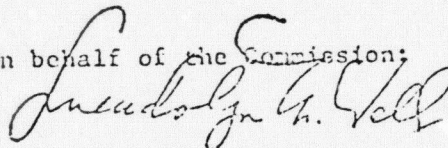
Thirdly, Respondent requests on its application if the applicants' wages have ever been garnisheed. It is reasonable to assume that an affirmative response by the applicant will produce a negative reaction from Respondent. Since the proportion of racial minorities among persons who have their wages garnisheed is significantly higher than the proportion of racial minorities in the general population, the employer's request for garnishment information has the effect of discriminating against minority group persons. Respondent's request is, therefore, violative of Title VII, absent a valid business necessity in this record.

Fourthly, the investigation revealed that Respondent conducts credit checks on applicants. According to 1967 Census Bureau Statistics, 35.4 percent of non-whites were below the poverty level, whereas 10.3 percent of whites were below the poverty level. Accordingly, we conclude that the screening of applicants on the basis, in part, of credit references has a disproportionate impact on minority group members. In the absence of business justification by Respondent, we find that this practice violates Title VII.

Finally, the investigation revealed that references are verified for applicants. When Respondent receives an adverse employment report from a previous employer of a minority group job applicant, it is significantly more likely that this report will have been influenced by racial discrimination than if the applicant were Caucasian. Thus, the clearly foreseeable effect of Respondent's use of verification of references as a hiring criterion without first giving the applicants the opportunity to explain or refute such reports, is to subject an appreciably greater percentage of Spanish Surnamed Americans and Negroes than Caucasians to national origin or race-tainted disqualifications. Respondent has offered no evidence that considerations of business necessity underlie its use of the criterion without affording applicants a reasonable opportunity to explain or refute the reports. Accordingly, we conclude that Respondent's employer reference policy violates Title VII.

Having determined that there is reasonable cause to believe that Respondent has engaged in unlawful employment practices, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. We enclose an information sheet entitled "Notice of Conciliation Process" for the attention of each party. A representative of this office will be in contact with each party in the near future to begin the conciliation process.

On behalf of the Commission:



Gwendolyn M. Wells, Director
Washington District Office

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)

Plaintiff,)

v.)

AMERICAN EXPRESS COMPANY,)

Defendant.)

Civil Action No. 76 Civ. 365 (LFM)

PLAINTIFF'S FIRST SET OF
INTERROGATORIES TO DEFENDANT COMPANY

TO: Howard Clarke, Chairman of the Board
American Express Plaza
New York, New York 10004

PLEASE TAKE NOTICE that Plaintiff requests, pursuant to Rule 33 of the Federal Rules of Civil Procedure, that any officer or other representative of Defendant, American Express Company, who is competent to testify in said Defendant's behalf and who knows the facts about which inquiry is made, answer under oath within thirty (30) days after service hereof, the following written interrogatories and identify separately for use as a description in a subpoena, all sources of information (whether documentary, human or otherwise) and

all records maintained by the Defendant or any other person or organization which pertain to or relate to the information called for by the interrogatory.

Use of the terms "division," "facility," "department," "job classification," or "job title" refers to those of Defendant's organizational units located in New York City and Washington, D. C. Wherever the term "annual pay rate" appears in an interrogatory and an employee is not paid by the Defendant on that basis, the basis for payment used, whether hourly, weekly, biweekly or monthly, is also requested.

1. Identify the state in which American Express Company is incorporated and the date of its incorporation.

2. List the addresses (including street, city, and borough) of all American Express facilities in New York City and Washington, D. C.

3. List the names of each division located at each of the facilities listed in answer to Interrogatory number 2. Indicate the nature of each division's operations.

4. List the departments in each division listed in Interrogatory number 3. Identify the facility and division in which each department is located. List the job classifications and job titles found in each department.

5. State what items, if any, each division ships across state lines or receives from across state lines.

6. For each division located at each facility listed in answer to Interrogatory number 3, list all departments with a description of each department's responsibilities.

7. List the number of employees in each division of each facility at each address listed in answer to Interrogatories number 2 and number 3.

8. State whether at any time between the dates specified below, the number of employees at any division at each facility listed in answer to Interrogatory number 2 dropped below the number indicated:

- a. 7/2/65 to 7/1/66 - 100 employees
- b. 7/2/66 to 7/1/67 - 75 employees
- c. 7/2/67 to 7/1/68 - 50 employees
- d. 7/2/68 to 3/24/73 - 25 employees
- e. 3/25 to the present - 15 employees

If the answer is in the affirmative, state the dates during which the number of employees dropped below the number specified above for the period in question and the numbers to which they dropped.

9. For each of the years 1960 to 1976 inclusive, for each division of the company in existence during that year, list by division and facility in existence for that year the name, race, date of application, Social Security number, and address of all persons applying to the company for employment. Indicate the national origin and citizenship of each black applicant. List the referral source of each applicant and the process by which application was made (e.g., by telephone, mail, or walk-in).

10. For each division of the company in existence during each of the years 1960 to 1976 inclusive, list by division and facility, the job titles or job classifications and annual pay rates of positions in which vacancies filled by new employees occurred. List the number of vacancies that occurred in each job title or job classification and the dates during which each vacancy existed.

11. For each of the years 1960 to the present, describe all recruitment efforts (such as newspaper ads, magazine ads, radio ads, TV ads, employment agencies, or word-of-mouth among employees) engaged in by any of the company's division.

12. For each of the years 1960 through 1976 inclusive, by division, facility and department, list the name, race, Social Security number, and address of all applicants who were rejected for employment. For each applicant, list all jobs with American Express Company for which each applicant applied, or was considered, the date of application, the date of rejection, and the reasons therefore. List the national origin of each black applicant.

13. For each of the years 1960 through 1976 inclusive, for each division, facility and department, list all persons hired by name, address, Social Security number, race, date of hire, position in which each was hired and the location of the position. List the national origin and citizenship of each black hired.

14. State whether during any of the years 1960 to the present, American Express Company, or any of its divisions or departments, has ever maintained a policy of inquiring into or otherwise ascertaining whether applicants for employment or for promotion have ever been arrested. If the answer is in the affirmative, indicate for which positions in which divisions, at which locations, in which departments and during which dates such inquiries were made. Indicate whether applicants found to have arrest records were or are rejected for employment or promotion by the company as a matter of policy.

15. For each of the years 1960 through 1976 inclusive, provide the name, address, Social Security number, race, and position for which rejected of each applicant who was rejected because of an arrest record. List the national origin and citizenship of each black who was rejected.

16. For each of the years 1960 through 1976 inclusive, provide the name, address, Social Security number, race, position sought, and position hired into of each applicant with an arrest record who was hired. List the national origin and citizenship of each black who was hired.

17. For each of the years 1960 through 1976 inclusive, provide the name, address, Social Security number, race, position sought and position hired into of each applicant who was not investigated to ascertain whether he had an arrest record. List the national origin and citizenship of each black listed in response to this interrogatory.

18. For each of the years 1960 through 1976 inclusive, state whether the company, or any of its divisions or departments, maintained a policy of inquiring into or ascertaining whether applicants for employment or promotion had ever had one or more wage garnishments. If the answer is in the affirmative, state the policy as well as to which divisions, departments, job classifications or job titles it was applicable. State the years in which it was applicable and all of the company's reasons for applying such a policy.

19. For each of the years 1960 through 1976 inclusive, state whether the company, or any of its divisions or departments, maintained a policy of discharging employees who had had their wages garnished on one or more occasions. If the answer is in the affirmative, state the policy as well as to which divisions, departments, job classifications or job titles it was applicable. State the years in which it was applied and all of the company's reasons for applying the policy.

20. For each person rejected for employment or promotion or for each person discharged for garnishment, state the name, address, Social Security number, division, department, job classification or job title, date of application (for hire or promotion), date of rejection and date of discharge. State the national origin and citizenship of each black named in response to this interrogatory.

21. For each of the years 1960 to 1976 inclusive, state the name, address, Social Security number, race, division, department, job classification or job title of persons whose wages were garnished who were hired, promoted, or not discharged. State the national origin and citizenship of each black named in response to this interrogatory.

22. For each of the years 1960 to 1976 inclusive, state the name, address, Social Security number, race, division, department, job classification or job title of applicants or employees whose records were not checked for garnishments. State the national origin and citizenship of each black listed in response to this interrogatory.

23. For each of the years 1960 to 1976 inclusive, state whether the company, its divisions or departments, has ever maintained a policy of checking the credit of applicants for employment or promotion. If the answer is in the affirmative, state the policy as well as the division, department, job classifications or job titles to which it was applicable and the years when such policy was in effect.

24. With respect to each applicant for hire or promotion for each of the years 1960 to 1976 inclusive, whose credit was checked, provide the name, race, address, Social Security number, division, department, job classification or job title (for promotions indicate the division, department, job classification and job title from which promotion was sought and to which promotion was sought). Indicate those rejected for employment or promotion and the dates thereof. List the national origin and citizenship of blacks listed in response to this interrogatory.

25. For each of the years 1960 to 1976 inclusive, state the name, race, Social Security number, address, position sought, and positions held (for those seeking promotion) of all applicants for hire or promotion whose credit was not checked. List the national origin and citizenship of blacks listed in response to this interrogatory.

26. For each of the years 1960 to 1976 inclusive, list as of January 31st of each year by division, department, job title or job classification and facility the name, race, Social Security number, address, date of hire, rate of pay of all persons employed by the company. State the national origin and citizenship of all blacks employed.

27. For each of the years 1960 to 1976 inclusive, list by division, facility, department, job classification and job title and pay rate (annual) all vacancies that were filled by persons already employed by the company. State the number of vacancies in each job title or job classification and the dates of all such vacancies.

28. For each of the years 1960 to 1976 inclusive, state the name, race, Social Security numbers and addresses of all persons considered for vacancies listed in response to Interrogatory number 27. State the national origin and citizenship of all blacks listed in response to this interrogatory.

29. For each individual named in the response to Interrogatory number 28, state the positions held (including division, facility, department) at the time he was being considered for the vacancy, the number of years in that position, all previous positions held and the number of years in each, the vacancy for which he was being considered (including division, facility, department) and the annual pay rates for each of the positions.

30. For each of the years 1960 to 1976 inclusive, state the name, race, Social Security number, address, annual pay rate, number of years in the position, previous positions held and number of years in each of all persons in job classifications or job titles from which other persons were promoted who were not themselves considered for promotions to vacancies existing within the company. State the company's reasons for not considering each for available vacancies. State the national origin and citizenship of all blacks listed in response to this interrogatory.

31. For each of the years 1960 to 1976 inclusive, state the name, address, race and Social Security number of all employees who filled vacancies listed in response to Interrogatory number 27. State the annual pay rate of the position from which the employee was moved, as well as the annual pay rate of the position to which each was moved. State the division, facility and department in which the person was employed before movement, as well as the division, facility and department in which the person was employed after filling the vacancy. State the number of years in the position held at the time of movement, as well as all previous positions held and the number of years in each. State the national origin and citizenship of all blacks named in response to this interrogatory.

32. For each of the years 1960 to 1976 inclusive, state the name, race, Social Security number, address, annual pay rate, division, facility, department, job title and job classification of all persons considered for vacancies listed in response to Interrogatory number 27 who were rejected for the positions for which they were considered. State all positions held by each individual. State the annual pay rate of each vacancy for which they were considered but rejected. State the reasons the company rejected each individual listed. State the national origin and citizenship of all blacks listed in response to this interrogatory.

33. With respect to each division, department and job classification or job title identified in response to Interrogatory number 4, list, ~~in~~ in the order of his company hire date, each person currently employed by the company and indicate with respect to each such person the following information in the following order:

- a. full name;
- b. Social Security number;
- c. race (include national origin if race is black);
- d. initial division, department, job classification, or job title, starting hourly rate, annual or weekly salary;
- e. each change in job position or classification, department, division and shift during employment and the date of each such change, and respective hourly rate, weekly salary or gross earnings for each year employed;
- f. present job classification, department, division, shift, all applicable seniority dates, and hourly rate or weekly salary;
- g. last year of school completed at time started employment;
- h. number of years of prior work experience in particular, specialty or related work, year completed, and brief description of prior training; and
- i. last known home address and telephone number.

34. With respect to each former employee of the company employed at any time between January 1, 1960 and the present, list in the order of his company hire date, and indicate with respect, to each such person, the following information in the following order:

- a. full name;
- b. Social Security number;
- c. race (include national origin if race is black);
- d. initial job classification, division, department, shift, starting hourly rate or weekly salary, and gross annual earnings for each employed;
- e. each change in job position or classification, department, division and shift during employment and the date of each such change, and respective hourly rate or weekly salary or gross earnings for each year employed;
- f. last year of school completed at time started employment;
- g. number of years of prior work experience in particular, specialty or related work, year completed, and brief description of prior training; and
- h. last known home address and telephone number.

35. State whether since 1960, the company has utilized any ~~written~~ standards to determine whether employees should be promoted and, if so, describe and identify all such documents, identify the years such written standards have been utilized, and state the name, Social Security number, race, address and job title of those who participated in or contributed to the formulation of such written standards. State the national origin and citizenship of all blacks identified in response to this interrogatory. State how the company determines whether or not an employee should be promoted, including a statement of the frequency of such determinations, and identify the supervisory level of those who participate in the decision whether or not to promote.

36. State whether the company at any time since January 1, 1960, has utilized an educational requirement for hire into any of its job classifications. If the answer is in the affirmative, answer the following:

- a. for each such job classification, indicate the division and facility in which located, what the educational requirement was or, if applicable, what it continues to be; the date(s) on which each such requirement was adopted and the reason for its adoption; the date(s) on which each such requirement was discontinued, if it was discontinued, and the reason for its discontinuance;
- b. identify each person involved in or having knowledge of the decision to adopt each such educational requirement; and
- c. identify and describe all documents (including validation studies) which attested to the need for each such educational requirement, and all documents upon which the answer to this interrogatory is based.

37. State whether the company has or had since 1960, an educational requirement for initial employment, or for promotion to any job classification or other such category identified in response to Interrogatory number 26.

- a. If the answer is in the affirmative, state what the educational requirement is or was, the date on which the company first instituted that requirement, and the job classifications or other such categories (include the division in which located) and departments that have or had an educational requirement, indicating the applicable requirement and effective dates for each;
- b. State the name, address, Social Security number, race (national origin and citizenship if black), division, department, job classification and job title of each person who, with respect to initial employment or promotion:
 - (1) was rejected and did possess the requisite education;
 - (2) was accepted and did possess the requisite education;
 - (3) was rejected and did not possess the requisite education; and
 - (4) was accepted and did not possess the requisite education.

38. For each of the years 1960 to the present, state the name, race, Social Security number, division, department, job title, annual pay rate, and date of hire of all persons discharged from American Express Company. For each person named, state the reason for discharge, the date of discharge, the name, race, division, department, job title or job classification of each. State the national origin and citizenship of each black named in response to this interrogatory.

39. For each of the years 1960 to the present, state the name, race, Social Security number, division, department, job title or job classification of all persons considered for discharge but not discharged. For each person named, state the reason he was considered for discharge and the reason he was retained. For each person considered for discharge, state the name, race, Social Security number, address, division, department, job title or job classification of each person participating in the consideration of the discharge, as well as of those participating in the decision to retain. State the national origin and citizenship of each black considered for discharge, as well as of those blacks participating in the consideration of the decision to discharge or to retain.

40. For each of the years 1960 to 1976 inclusive, state whether the company or any of its divisions or departments has or had any written policies specifying infractions or actions for which company employees would be discharged. State those policies for each year, division, or department of the company. State the rationale for making each infraction the basis of a discharge. Identify all persons (by name, race, Social Security number, address, division, department and job title) participating in the making and enforcement of these policies.

41. For each of the years 1965 to 1976 inclusive, for each division and facility identified in response to Interrogatory numbers 2 and 3, state the policy, if any, American Express Company has had concerning eligibility for granting of and duration of maternity leave. State the reasons why American Express Company adopted said policy.

42. For each of the years between 1965 to 1976 inclusive, with respect to each facility identified in response to Interrogatory number 2, state the company policy governing the accrual and use of sick leave.

43. State whether for each of the years 1965 to 1976 inclusive, employees could use their sick leave for any pregnancy-related absence. If your answer is negative, state the reasons why not.

44. For each of the years 1965 to 1976 inclusive, for each division, facility and department identified in response to Interrogatories numbered 2, 3 and 4, identify each employee of American Express Company who has requested or been granted maternity leave, indicating with respect to each such person the following information:

- a. the date such request was made;
- b. the date such leave was granted;
- c. whether such leave was taken;
- d. amount of accumulated sick leave at the time leave was taken;
- e. amount of sick leave used during maternity leave;
- f. the beginning and ending dates of the leave;
- g. the position and corresponding annual salary held at the time leave was taken;
- h. the position and corresponding annual salary upon return from leave;
- i. whether American Express Company required the employee to take leave at a certain time and, if so, specify the particular time;
- j. the date of delivery, abortion, or miscarriage;
- k. whether any claims for sick leave pay or disability pay were submitted by the employee, and the dates of such claims; and
- l. whether any sick leave pay, disability pay, or vacation pay was paid the employee while on leave and, if so, the amount of such payments and the time period during which such payments were made.

45. For each of the years 1965 to 1976 inclusive, for each division, facility and department identified in response to Interrogatories numbered 2, 3 and 4, state the policy, if any, American Express Company had concerning eligibility for granting and duration of medically necessitated leave for reasons other than maternity. Describe and identify all documents referring to such policies and the implementation. State the reasons why American Express Company adopted such policies.

46. State whether at any time during each of the years 1965 to 1976, employees could use their accredited sick leave for temporary disabilities other than for maternity reasons. If your answer is affirmative, state the circumstances under which such employees can use their accredited sick leave for such a purpose.

47. For each of the years 1965 to 1976 inclusive, for each facility identified in response to Interrogatory number 2, identify each employee of American Express Company who has requested or been granted leave of absence for medical reasons other than maternity reasons, indicating with respect to each such person the following information:

- a. the date such request was made;
- b. the date such leave was granted;
- c. whether such leave was taken;
- d. the amount of accumulated sick leave at the time leave was taken;

- e. the amount of sick leave used during the medically necessitated leave;
- f. the beginning and ending dates of the leave;
- g. the position and corresponding salary held at the time leave was taken;
- h. the position obtained and corresponding salary upon return from leave;
- i. whether American Express Company required the employees to take leave at a certain time. If so, specify the particular time;
- j. the medical reason for the leave;
- k. whether any claims for sick leave pay or disability pay were submitted by the employee, and the dates of such claims;
- l. whether any sick leave pay, disability pay or vacation pay was paid the employee while on leave and, if so, the amount of such payments and the time period during which such payments were made;
- m. whether the employee was terminated from employment because of medical reasons and, if so, the reasons therefore and the dates of termination; and
- n. the sex of each employee.

48. State the purposes or functions which are fulfilled by any requirement that requests for maternity leave be made in advance of leave and the personnel considerations which govern requests for and grants of maternity leave.

49. State the purposes or functions which are fulfilled by any requirement that requests for leave other than maternity leave be made in advance of leave and the personnel considerations which govern requests for and grants of leave for medical reasons other than for maternity reasons.

50. Describe and identify all sick leave benefit and disability benefit plans maintained by American Express, or in which it participated, for each of the years 1965 to the present. With respect to each such plan, state whether the plan provides benefits for pregnancy-related disabilities. If your answer is negative, state all of the reasons why pregnancy-related disabilities are not included within the coverage of such plans, identifying all persons since 1965 who participated in the decision to exclude, or have knowledge of the reasons for exclusion of, pregnancy-related disabilities from the coverage of such plans.

51. State for each of the years 1965 to the present, the percentage of an employee's salary that is paid to an employee receiving disability benefits.

52. Identify all written material in the possession of the company which explains the provisions of its sick leave benefit and disability plans.

53. For each of the years 1965 to 1976 inclusive, identify each employee of American Express Company having responsibility for each of the following areas or participating in each of the following activities of American Express Company, and identify with respect to each such area the supervisory employees directly responsible for:

- a. formulation and/or administration of leave of absence policies;
- b. formulation and/or administration of sick leave benefit policies; and
- c. formulation and/or administration of disability benefit policies.

54. For each of the years 1965 to the present, identify and describe the employment information, and the method of retention of such information, the company routinely prepares or contracts to prepare on discs, data cells, computer tapes, or IBM cards or other such forms. For each of the years 1965 to the present, identify, with appropriate documentation, the computer tapes, discs, data cells or IBM cards so prepared and describe each field maintained on such tapes, the number of spaces on each field, the date each such computer tape or other such form was prepared, the track of each such tape, and the number of computer tapes or other such forms prepared as of each date.

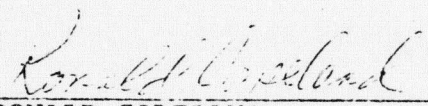
55. For each of the years 1965 to the present, describe and identify all programs and accompanying printouts run in conjunction with the employment information routinely retained on discs, data cells, computer tapes, or IBM cards, or other forms as stated in response to Interrogatory number 54.

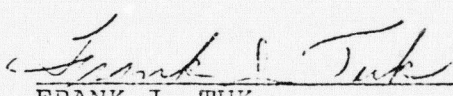
56. Identify in a manner sufficient for inclusion in a request for production of documents, all computer tape formats in the possession of American Express Company relating to its employees, including but not limited to, all personnel and payroll information. For each format identified, indicate the name, address and title of the person having custody of such document.

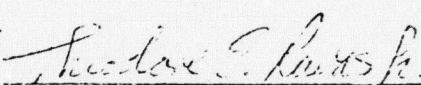
57. State for which years, if any, between 1960 and 1976, the company has maintained photographs of any of its current employees. Indicate whether any of the photographs are in black and white or are in color. Indicate as to which employees in which divisions, departments and facilities such photographs are maintained.

Respectfully submitted,

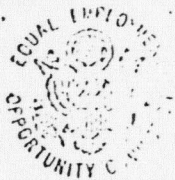
DELORES WILSON
Assistant General Counsel


RONALD COPELAND
Regional Counsel
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
New York Regional Office
26 Federal Plaza, Rm. 1615
New York, New York 10007


FRANK J. TUK
Supervisory Trial Attorney


THEODORE E. RAVAS, JR.
Trial Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Philadelphia Regional Office of General
Counsel
127 N. Fourth Street, Suite 200
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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
26 FEDERAL PLAZA, ROOM 4002
(At Foley Square)
NEW YORK, NEW YORK 10007
264 - 3640

APR 5 1973

Irving Engel, Esq.
50 Court Street
Brooklyn, New York 11201

Re: Ferrell vs. American Express
YNY 3-048

Dear Mr. Engel:

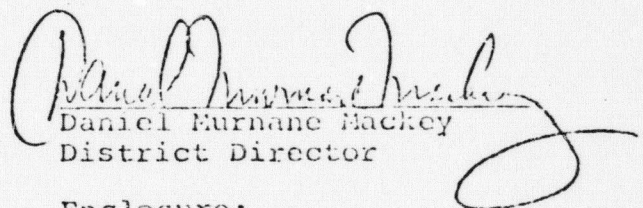
Please be advised that after having found reasonable cause to believe that the charge in the above-referenced case is true, the Commission has been unable to achieve a satisfactory settlement of this matter through voluntary conciliation.

Accordingly, you now have the right to commence a civil action in the appropriate United States District Court.

Before you initiate such a lawsuit, you must request, in writing, that this office issue you a "Notice of Right to Sue."

The Commission can assist you in this matter. If you need assistance in getting your case filed in the United States District Court, if you need an attorney, or if you have any questions regarding your case, kindly either write me at the above address or telephone me at (212) 264-3640.

Very truly yours,


Daniel Burnane Mackey
District Director

Enclosure:

Notice of Judicial Review

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY	)	
COMMISSION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	76 Civ. 365 (GLG)
	)	
AMERICAN EXPRESS COMPANY,	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Philadelphia Regional Office of
General Counsel
127 N. Fourth Street, Suite 200
Philadelphia, Pennsylvania 19106

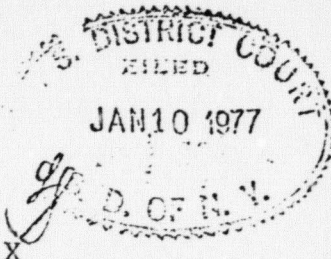
* * *

STATEMENT OF FACTS

Plaintiff instituted this action on January 21, 1976 alleging that defendant engaged in, and continues to engage in, discriminatory employment practices made unlawful by Title VII in its recruitment, hire, limitation, segregation, and classification of employment and maternity policies and practices. The complaint was jurisdictionally based on the filing of two charges, one filed by Clarence M. Ferrell and the other by Mary Reese. Information obtained in the separate investigations of those charges provided the factual basis for the resulting complaint by the Commission.

* * *

75a
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- X
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, : 76 Civ. 365 (GLG)

Plaintiff, :

-against- :

O P I N I O N

AMERICAN EXPRESS COMPANY, :

45505

Defendant. :

----- X

A P P E A R A N C E S :

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Philadelphia Regional Office of General Counsel
127 N. Fourth Street, Suite 200
Philadelphia, Pennsylvania 19106

By: Theodore E. Ravas, Jr., Esq.
Frank J. Tuk, Esq.
Of Counsel

PROSKAUER, ROSE, GOETZ & MENDELSON, ESQS.
Attorneys for Defendant
300 Park Avenue
New York, N.Y. 10022

By: Morton M. Maneker, Esq.
Franklin S. Bonam, Esq.
Warren J. Casey, Esq.
Of Counsel

FILED
JAN 10 1977
S.D. OF N.Y.

G O E T T E L , D. J.

Defendant, American Express Company, has moved to disnass the Equal Employment Opportunity Commission's ("EEOC") Title VII discrimination suit on three grounds: First, that the filing of a civil suit by an individual acts as a bar to any later filing of a separate suit by the EEOC based upon any of the same acts of alleged discrimination. Second, that the statute of limitations on an action for back pay acts as a complete or partial bar to this suit. Finally, that the action is barred by laches. The defendant's motion is denied.

I. Private Suits as a Bar
To the EEOC Actions

*

One of the two citizen complaints which commenced the EEOC action against the defendant involves an allegation of racial discrimination by a West Indian black supervisor

* The two complaints were unrelated and came from different offices of the defendant in different cities. While both were originally made on the basis of racial discrimination, the action as to the second complaint is brought as to sexual discrimination.

against a complaining American black subordinate, Clarence Ferrell. Ferrell claimed that the supervisor was prejudiced against American blacks, whom he apparently thought were inferior to West Indian blacks. Ferrell pursued his complaint through the preliminary steps required by Title VII as prerequisites to civil suit and, having received a "Right to Sue" letter on July 3, 1973, commenced a civil action against American Express Co. on September 20, 1973. Prior to trial, this private action was resolved by way of settlement between the parties on March 28, 1975. At no time during the pendency of this private suit did the EEOC move to intervene under the provisions of Section 706(f)1, 42 U.S.C. §2000e-5(f)1. On January 21, 1976, EEOC filed this action alleging, inter alia, that American Express engaged in discriminatory employment practices based upon race. Defendant argues that the prior private civil action by Ferrell, commenced and settled without intervention by the EEOC, bars the later public action.

Title VII, while no model of statutory lucidity, has, as to this argument, been best interpreted by the

Sixth Circuit in Equal Employment Opportunity Commission v. Kimberly-Clark Corp., 511 F.2d 1352 (6th Cir. 1975), cert. denied, 423 U.S. 994 (1975). That Court viewed the statutory framework established by the 1972 amendments to Title VII to be intended to avoid duplicative suits, but not to limit the EEOC to actions commenced before the private right of suit was energized. When the Commission's investigation discloses a number of discriminatory practices in one organization, or where conciliation attempts proceed beyond the private claimant's 180 day waiting period, the EEOC is not estopped from instituting suit to vindicate the larger public interests involved. Accord, Equal Employment Opportunity Commission v. Huttig Sash & Door Co., 511 F.2d 453 (5th Cir. 1975).

The defendant's reliance on Equal Employment Opportunity Commission v. Missouri Pacific R. Co., 493 F.2d 71 (8th Cir. 1974) and Equal Employment Opportunity Commission v. Pacific Press Publishing Ass'n, 535 F.2d 1182 (9th Cir. 1976) is unsound. In Missouri Pacific the Eighth Circuit ruled on a Commission attempt to commence a separate public

action while a private action was pending without first seeking permissive intervention. In Pacific Press the Ninth Circuit similarly addressed a case involving a pending private suit and a separate EEOC public suit. In the case at bar, however, the private suit is neither coterminous with the EEOC action, nor was it still pending at the time the EEOC filed suit. Consequently, the prior settlement of the private suit is no bar to the EEOC action.

While the settlement between Ferrell and American Express would preclude any further recovery on his behalf by the Commission, it does not bar a Commission suit based upon the Ferrell discrimination charge. Equal Employment Opportunity Commission v. Kimberly-Clark Corp., *supra*; see also Equal Employment Opportunity Commission v. McLean Trucking Company, 525 F.2d 1007, 1010-1 (6th Cir. 1975).

II. Statute of Limitations

Defendant's second argument is that the failure of the Commission to file suit within the 180 day time period described in Section 706(f)(1) should result in dismissal

of the EEOC suit on statute of limitations grounds. Generally, the government's suits to enforce its own rights may, if no limitation is found in federal law, be pursued without limitation. United States v. Summerlin, 310 U.S. 414 (1940). While Title VII is silent as to a limitation period, defendant argues that to leave such an open-ended right in this case would unfairly allow the government to pursue private rights to back pay in the guise of public suits. (It concedes that injunctive relief for continuing violations would not be barred.)

There are several convincing responses to this argument. First, the underlying purpose of the procedures outlined in Section 706, and the intent of Congress, is to encourage conciliation and negotiation between the Commission and subjects of potential suits. If the Commission were compelled to institute suit within 180 days, organizations would have an incentive to procrastinate during the Commission's investigation and negotiations in order to expend the 180 days and preclude a Commission suit. Such a result would be contrary to the intentions expressed by the Congress. Secondly, agency actions for back pay have been deemed suits in the

public interest notwithstanding the personal benefits conferred. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1976). Thirdly, the Congress was aware of the EEOC's large backlog of cases when the 1972 amendments to Title VII were made applicable to charges pending at the time those amendments became effective. International Union of Electrical, Radio and Machine Workers v. Robbins & Meyers, Inc., ____ U.S. ____ (No. 75-1264, December 20, 1976). Had the 180 day period been deemed a limitation period this retroactive application would have acted as a bar to any suits in the great many cases in the Commission's backlog. Nowhere does this intent manifest itself in the legislative history.

Finally, the defendant's argument that the statute of limitations acts as a restriction on the period of time for which back pay can be awarded is facially contrary to the language of Section 706 which extends back pay liability as far as two years from the date of a complaint to the Commission. Admittedly, there is an unfairness to allowing the agency to delay many years before commencing suit, then seek

back pay for the entire period plus two years before. But, on the face of it, this seems to have been Congress' intent.

While the defendant's motion is denied on this second ground, it is done with leave to renew the motion should the Supreme Court's disposition of Equal Employment Opportunity Commission v. Occidental Life Insurance Co., 535 F.2d 533 (9th Cir. 1976), cert. granted, ___ U.S. ___ (December 13, 1976) warrant the Court's reconsideration.

III. Laches

Defendant argues, as a third basis for dismissal, the defense of laches. Defendant points to the fact that the citizen grievances underlying this suit were filed in June, 1971 and March, 1972, yet the EEOC did not commence suit until January 21, 1976 -- a period of almost five years. The Commission responds that this period was time well-spent and was due, in some part, to the prolonged series of negotiations with American Express.

While the record to date does not support a conclusion that the EEOC's handling of this case was a model of promptness and expedition, neither does it yet support a ruling against them on laches. The Courts of Appeals are in

disagreement on the applicability of laches to an EEOC action. Compare Equal Employment Opportunity Commission v. North Hills Passavant Hospital, ___ F.2d ___ (3rd Cir. 1976) and United States v. Georgia Power Company, 474 F.2d 906 (5th Cir. 1973). In any case, it has been recognized that delay per se does not give rise to a plea of laches. Equal Employment Opportunity Commission v. E. I. DuPont deNemours and Co., 516 F.2d 1297 (3rd Cir. 1975). For the defense of laches to lie, the defendant must show both inexcusable delay or a lack of diligence and prejudice resulting from the passage of time. Cf. Equal Employment Opportunity Commission v. North Hills Passavant Hospital, supra.

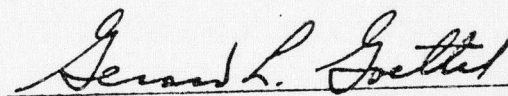
While the facts do disclose the great amount of time taken by the Commission's pre-suit activity, it has not been shown that this time was expended as a result of a prejudicial lack of diligence rather than a singularly time-consuming effort first toward conciliation and then toward settlement. Since the defendant has not demonstrated any prejudice such as would support a complete defense of laches, the court need not rule on whether the defense is, as a matter of law,

available to the defendant. See Equal Employment Opportunity Commission v. North Hills Passavant Hospital, supra.

The only demonstrable hardship visited upon the defendant is that it is now faced with the possibility of eight or so years of back pay for every affected employee, while prompt action could have reduced this by more than half. If this is not a partial statute of limitations defense (see Point II supra), defendant may be entitled to some mitigation of damages because of laches. This aspect (which would not be grounds for dismissing the cause of action in any event), can be better evaluated after the Supreme Court has decided Equal Employment Opportunity Commission v. Occidental Life Insurance Co., supra.

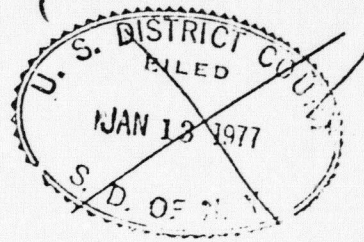
SO ORDERED:

Dated: New York, N.Y.,
January 6, 1977.


U.S.D.J.

85a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Opinion*
Plaintiff, *Re: #45505* 76 Civ. 365 (GLG)
-against-
AMERICAN EXPRESS COMPANY,
Defendant.
-----X
GOETTEL, D. J.:

FILED
U.S. DISTRICT COURT
JAN 13 3 01 PM '77
ORDERS

The opinion dated January 6, 1976 is hereby amended
nunc pro tunc as follows:

1) The attached caption page and page 9 are substituted for the corresponding pages of the original.

SO ORDERED:

Dated: New York, N.Y.,
January 13, 1977.

Samuel L. South

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, : 76 Civ. 365 (GLG)

Plaintiff, :

-against- : O P I N I O N

AMERICAN EXPRESS COMPANY, :

Defendant. :

----- X

A P P E A R A N C E S :

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Philadelphia Regional Office of General Counsel
127 N. Fourth Street, Suite 200
Philadelphia, Pennsylvania 19106
By: Theodore E. Ravas, Jr., Esq.
Frank J. Tuk, Esq.
Of Counsel

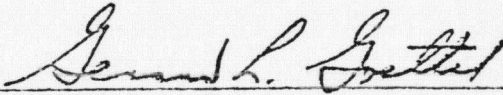
PROSKAUER, ROSE, GOETZ & MENDELSON, ESQS.
Attorneys for Defendant
300 Park Avenue
New York, N.Y. 10022
By: Morton M. Maneker, Esq.
Franklin S. Bonem, Esq.
Warren J. Casey, Esq.
Of Counsel

available to the defendant. See Equal Employment Opportunity Commission v. North Hills Passavant Hospital, supra.

The only demonstrable hardship visited upon the defendant is that it is now faced with the possibility of eight or so years of back pay for every affected employee, while prompt action could have reduced this by more than half. If this is not a partial statute of limitations defense (see Point II supra), defendant may be entitled to some mitigation of damages because of laches. This aspect (which would not be grounds for dismissing the cause of action in any event), can be better evaluated after the Supreme Court has decided Equal Employment Opportunity Commission v. Occidental Life Insurance Co., supra.

SO ORDERED:

Dated: New York, N.Y.,
January 6, 1977.


U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

EQUAL EMPLOYMENT OPPORTUNITY	:	
COMMISSION,	:	76 Civ. 365 (GLG)
	:	
Plaintiff,	:	
	:	<u>NOTICE OF APPEAL</u>
-against-	:	
	:	
AMERICAN EXPRESS COMPANY,	:	
	:	
Defendant.	:	
	:	
-----X		

S I R S :

PLEASE TAKE NOTICE that defendant American Express Company hereby appeals to the United States Court of Appeals for the Second Circuit from the order herein entered January 10, 1977, as amended by order dated January 13, 1977, denying defendant's motion to dismiss the complaint.

Dated: New York, New York
February 15, 1977

PROSKAUER ROSE GOETZ & MENDELSON

By Morton M. Maneker
Morton M. Maneker
A Member of the Firm
Attorneys for Defendant
300 Park Avenue
New York, New York 10022
(212) 593-9000

TO:

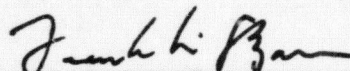
CLERK OF THE COURT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Philadelphia Regional Office of
General Counsel
127 North 4th Street, Suite 2000
Philadelphia, Pennsylvania 19106

FILED
FEB 15 4 17 PM '77
S.D.N.Y.

CERTIFICATE OF SERVICE

I am one of the attorneys for appellant.
I hereby certify that one copy of the foregoing
Appendix has been served by express messenger on
Gary T. Brown, Esq., 3354 Breckenridge Court,
Annandale, Virginia 22003, this 20th day of April,
1977.



FRANKLIN S. BONEM

Ronald J. Copeland
Rec'd 1/20/77